18

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Supreme Court of the United States

OCTOBER TERM, 1953

No. 581

SIMPLEX CLOTH CUTTING MACHINE CO., INC.,

Petitioner,

against

The Honorable ALEXANDER HOLTZOFF,
United States District Judge,

and

EASTMAN MACHINE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX TO PETITION

	PAGE
Petition for a Writ of Certiorari	1
Summary and Statement of the Matter Involved	2
Opinions Below	3
Jurisdiction	4
Questions Presented	4
Statutes Involved	4
Reasons for Granting the Writ	5
Conclusion	14

Cases Cited

Bankers Life & Casualty Co. v. Holland, —— U. S. ——, 98 L. Ed. (Advance p. 85) December 21, 1953 ..... 6, 8

C-O-Two Fire Equipment Co. v. Barnes, 194 F. 2d 410 (C. A. 7, 1952) affirmed 344 U. S. 861 (1952) rehearing denied 344 U. S. 900 (1952) 6, 8, 12

Dalton v. Shakespeare Co., 196 F. 2d 469 (C. A. 5, 1952) 12

First National Bank of Chicago v. United Air Lines, 190 F. 2d 493 (C. A. 7, 1951) certiorari denied 341 U. S. 903 (1951) reversed on other grounds 342 U. S. 396 (1952) 7

Foster-Milburn Co. v. Knight, 181 F. 2d 949 (C. A. 2, 1950) 9

Galveston, etc., Railway v. Gonzales, 151 U. S. 496 (1894) 10

Gulf Research & Development Co. v. Leahy, 193 F. 2d 302 (C. A. 3, 1951) affirmed 344 U. S. 861 (1952) rehearing denied 344 U. S. 900 (1952) .. 8

Riley v. Union Pacific R. Co., 177 F. 2d 673 (C. A. 7, 1949) certiorari denied 338 U. S. 911 (1950) ... 7

Schiller v. Mit-Clip Co., Inc., 180 F. 2d 654 (C. A. 2, 1950) 7

United States v. 11 Cases, More or Less, Ido-Pheno-Chon, 94 F. S. 925 (D. C. Oregon, 1950) 6

Wiren v. Laws, 194 F. 2d 873 (C. A. D. C., 1951) 9

Textbooks Cited

PAGE

Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, Volume 1, page 154 10

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Statutes Cited

Title 28 U. S. C.:

Section 113 (Judicial Code, Section 52). Repealed .. 5, 10

Section 1254(1) 4

Section 1391(c) 5, 10, 11, 12, 13

Section 1392 10

Section 1400(b) 2, 5, 11, 12, 13

Section 1404(a) 7

Section 1406(a) 2, 4, 6, 7, 8

Section 1651(a) 5

IN THE

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THE HONORABLE ALEXANDER HOLTZOFF,
UNITED STATES DISTRICT JUDGE,

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EASTMAN MACHINE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Simplex Cloth Cutting Machine Co., Inc. respectfully prays for the issuance of a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Second Circuit, entered on October 9, 1953, denying a Petition for a Writ of Mandamus and the Judg-

ment of the same Court, entered on November 9, 1953, denying a Petition for a Rehearing. The Petition for a Writ of Mandamus was to review and vacate an order of the Honorable Alexander Holtzoff, United States District Judge, entered on October 2, 1953, transferring the action from the United States District Court for the Southern District of New York to the United States District Court for the Western District of New York.

Summary and Statement of the Matter Involved

On July 9, 1953, Petitioner filed in the United States District Court for the Southern District of New York, under Civil Action No. 86-245, a Complaint charging Respondent Eastman Machine Company with patent infringement (R. 27). Venue was predicated upon the allegation that said Respondent was a New York corporation having an office and place of business in the Southern District of New York (R. 27). Respondent did not answer the Complaint but instead moved on September 22, 1953 to transfer the action to the United States District Court for the Western District of New York, pursuant to Title 28 U. S. C., Section 1406(a), or in the alternative, to dismiss the action pursuant to Title 28 U. S. C., Section 1400(b) (R. 6). In support of the motion, Respondent alleged that it did not have a residence or a regular and established place of business within the Southern District of New York, but that its residence and regular and established place of business was in the Western District of New York (R. 7).

The Honorable Alexander Holtzoff granted the motion from the Bench to the extent of transferring the action to the Western District of New York and an order to that effect was signed and entered on October 2, 1953 (R. 6). It was to review and vacate said order that the Petition for a Writ of Mandamus was filed with the United States Court of Appeals for the Second Circuit (R. 1). The Petition was denied from the Bench on

October 9, 1953 and a Petition for a Rehearing was denied on November 9, 1953 (R. 29).

Judge Holtzoff has not participated in this case since the signing and entering of his Order of October 2, 1953.

All of the facts of the case upon which the present Petition is based are either admitted or not denied and these facts are as follows:

1. Respondent Eastman Machine Company is a New York corporation (R. 10).

2. The name of Respondent Eastman Machine Company appears on the window of a showroom in the Southern District of New York, and the address and telephone number of said showroom are listed under Respondent's name in the Manhattan (Southern District of New York) alphabetical telephone directory (R. 12).

3. Respondent Eastman Machine Company is advertised in three New York classified telephone directories, one New Jersey classified telephone directory, and listed in four trade directories and on its own letterhead as having an office and place of business in the Southern District of New York (R. 18-26).

4. For twenty years Respondent Eastman Machine Company has been selling in the Southern District of New York through an independent sales agent and representative and Eastman has been billing and delivering directly from its home office in the Western District of New York (R. 8, 9).

Opinions Below

The order of the Honorable Alexander Holtzoff, respondent herein, entered on October 2, 1953, and the Judgments of the Court of Appeals, entered, respectively, on October 9, 1953 and November 9, 1953, issued without opinion.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit, on rehearing, was entered on November 9, 1953 (R. 29). The jurisdiction of the Supreme Court of the United States is invoked under Title 28 U. S. C., Section 1254(1).

Questions Presented

1. Does the District Court of a District in which is filed a case laying venue in the right District have the power, under Section 1406(a), to transfer such case to another District in which it could have been brought?

2. Should a Writ of Mandamus issue to vacate an order of a District Court, made under Section 1406(a), transferring a case from a District of proper venue to another District in which it could have been brought?

3. In a patent infringement action against a corporation of a State containing more than one District, is venue, based solely on residence, properly laid in any district in said State?

STATUTES INVOLVED

As to the First Question

Title 28 U. S. C., Section 1406. Cure or waiver of defects.

a. The district court of district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

As to the Second Question

Title 28 U. S. C., Section 1651. Writs.

a. The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

As to the Third Question

Title 28 U. S. C., Section 113 (Judicial Code, Section 52). Repealed.

When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides * * *.

Title 28 U. S. C., Section 1391. Venue generally.

c. A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

Title 28 U. S. C., Section 1400. Patents and copyrights.

b. Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

Reasons for Granting the Writ

1. Presented here are important questions of federal procedural law which have not been settled by the Supreme Court. These questions transcend the specific issues of the present case and they are important not only to the effective administration of federal patent law but also to the effective administration of federal law generally.

As to the First Question

2. The power of a District Court to transfer an action from one District to another, under Title 28 U. S. C., Section 1406(a), has not as yet been fully and clearly defined and determined. The decisions of the several Courts of Appeals and District Courts uniformly uphold the power of a District Court to transfer an action from a District of wrong venue to a District of right venue. See *C-O-Two Fire Equipment Co.* v. *Barnes,* 194 F. 2d 410 (C. A. 7, 1952), affirmed 344 U. S. 861 (1952), rehearing denied 344 U. S. 900 (1952), and *Bankers Life & Casualty Co.* v. *Holland,* 199 F. 2d 593 (C. A. 5, 1953), affirmed —— U. S. ——, 98 L. Ed. (Advance p. 85), December 21, 1953.

3. The question here presented, however, is whether a District Court has the power, under Section 1406(a), to transfer a case from a District of proper venue to another District in which the case could have been brought. The problem was clearly stated in *United States* v. *11 Cases, More or Less, Ido-Pheno-Chon,* 94 F. S. 925 (D. C. Oregon, 1950) as follows:

> "The problem raised by the motion [to transfer the case to another District] is assumed to be of easy solution. For a District Court burdened with work, any move to remove a cause elsewhere is to be welcomed as a relief of some of the burden. But there is always the serious question of power. Simply because the final problem is one of place of trial, it is generally believed only venue is involved. But actually there is a transfer of jurisdiction. • • •
>
> "The District Courts of the United States were not created as units of one vast continental judicial system. Each has been organized by special statute as a court of the judicial system of the state in which it exercises power. A District Court is a separate

entity. No District Court has jurisdiction crossing a state boundary. By virtue of these limitations, the transfer of any cause from one district to another is a question of power. No District Court has such inherent authority. There must be an express statutory grant as a condition precedent to the initiation of the transfer."

4. Does Section 1406(a) empower a District Court to transfer a case from a District of proper venue to another District in which it could have been brought? The answer appears to be clearly and definitely in the negative. *Schiller* v. *Mit-Clip Co., Inc.,* 180 F. 2d 654 (C. A. 2, 1950); *First National Bank of Chicago* v. *United Air Lines,* 190 F. 2d 493, 496 (C. A. 7, 1951) certiorari denied 341 U. S. 903, reversed on other grounds, 342 U. S. 396; *Riley* v. *Union Pacific R. Co.,* 177 F. 2d 673 (C. A. 7, 1949) certiorari denied 338 U. S. 911; *Ohlinger's Federal Practice,* Revised Edition, Volume 1-A, page 327. In *Riley* v. *Union Pacific R. Co., supra,* the Court held that Section 1406(a) "provides statutory sanction for transfer only where venue is improperly laid." In *Ohlinger's Federal Practice, supra,* it is stated that Section 1406(a) "covers a situation the converse of that for which provision is made in Section 1404(a), *supra,* namely, where the action is improperly brought in the *wrong* division or district." (Ohlinger's emphasis.)

As to the Second Question

5. It is assumed in this discussion of the second question herein presented that the answer to the first question is in the negative. Assuming, therefore, that a District Court does not have the power, under Section 1406(a) to transfer a case from one District of proper venue to another, should a Writ of Mandamus issue to review and vacate such order of transfer? It is respectfully submit-

ted that the answer to this question should be in the affirmative.

6. There is a conflict of opinion regarding the question of whether a transfer order or an order refusing transfer is reviewable by way of a Writ of Mandamus. In *C-O-Two Fire Equipment Co.* v. *Barnes,* 194 F. 2d 410 (C. A. 7, 1952) the Court of Appeals for the Seventh Circuit issued a Writ of Mandamus ordering a District Court to transfer a case, under Section 1406(a), from a District of wrong venue to a District of right venue. This decision was affirmed by the Supreme Court in 344 U. S. 861 (1952), rehearing denied 344 U. S. 900 (1952). The Supreme Court was equally divided. On the other hand, in *Gulf Research & Development Co.* v. *Leahy,* 193 F. 2d 302 (C. A. 3, 1951) the Court of Appeals for the Third Circuit refused to issue a Writ of Mandamus to compel a transfer of a case under Section 1406(a) and this decision was also affirmed by the Supreme Court by an equally divided Court, 344 U. S. 861 (1952), rehearing denied, 344 U. S. 900 (1952).

7. It is not known whether *Bankers Life & Casualty Co.* v. *Holland,*—U. S.—, 89 L. Ed. (Advance p. 85), December 21, 1953 was intended to constitute the final answer to the question herein presented. Some of its language appears broad enough to preclude the use of a Writ of Mandamus in all cases involving a transfer of venue. But the following statement seems to limit the broad language to the specific circumstances of the case before the Court: "We are of the opinion that in the circumstances of this case the writ was inappropriate." Furthermore, in the dissenting opinion it is stated that "Discussion of mandamus in this case is not even useful as dicta for future guidance on an important issue. The court's opinion does not help decision when a party is dismissed from a litigation for reasons not as obviously compelling as those in this case.

It necessarily leaves open the question whether such a ruling by a district judge may be reviewed by mandamus, without awaiting the completion of the entire litigation, in circumstances where postponement of review would involve a protracted trial, entailing heavy costs and great inconvenience."

8. The last sentence in the foregoing quotation is most pertinent to the facts of the present case. It is stated in the Petition for a Writ of Mandamus that "The injury to the petitioner cannot be corrected upon appeal from final judgment because: * * * Petitioner will be compelled to conduct and try the case in a District which is remote from petitioner's office and place of doing business, to the great inconvenience and expense of petitioner and petitioner's witnesses" (R. 4, 5). This statement was not challenged by respondent Eastman Machine Company save on the ground that it was made for the first time in connection with the Petition for Mandamus. But this is precisely where it should have been made in order to invoke the jurisdiction of the Court of Appeals. The point was made solely to show that Mandamus was appropriate and not to show that Judge Holtzoff was wrong.

9. It is Petitioner's contention that a Writ of Mandamus should issue to review an order of transfer made without statutory power. *Foster-Milburn Co.* v. *Knight,* 181 F. 2d 949 (C. A. 2, 1950); *Wiren* v. *Laws,* 194 F. 2d 873 (C. A. D. C., 1951). Said the Court in *Wiren* v. *Laws, supra:*

> "But the question of review by mandamus is one of first impression in this circuit, though it has been the subject of decision in several other circuits. The concensus of such decisions is that jurisdiction to issue the writ in aid of the reviewing courts' appellate jurisdiction exists where the grounds for transferring the cause are insufficient to support the order and to bring it within the terms of the statute."

As to the Third Question

10. Under the old Judicial Code, a corporation created under the laws of a State containing two or more judicial Districts would be considered an inhabitant of the District in which its main office was located and only in such District could it be sued. *Galveston etc. Railway* v. *Gonzales,* 151 U. S. 496 (1894). But old Section 52 (Title 28 U. S. C., Section 113) has now been repealed and the following Reviser's Note appears under new Section 1392 of Title 28:

> "Words of said section 113 'against a single defendant, inhabitant of such State, must be brought in the district where he resides' were omitted as covered by section 1391."
>
> Section 1391(c) provides that "A corporation may be sued in any judicial district in which it is incorporated . . ."

11. No reported decision has been found construing this new Section in relation to a State having more than one judicial District and it appears appropriate to state the views of the Revisers of the Judicial Code. The Chief Reviser was William W. Barron and associated with him was Judge Holtzoff, one of the Respondents herein. In their book entitled *Federal Practice and Procedure,* Rules Edition, Volume 1, page 154, the following appears:

> "Congress took the next long step by enacting into law the provision that 'a corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business and such judicial district shall be regarded as the residence of such corporation for venue purposes.' Presumably, if the state of incorporation has more than one district, the corporation may be sued in any district

thereof, on the theory that it is 'licensed to do business' throughout the whole state. Previously the rule in such cases was that the corporation would be deemed a resident only of the district wherein it kept its principal office and transacted its general corporate business."

12. The same view is expressed in the *Cyclopedia of Federal Procedure,* Third Edition, Volume 3, pages 31 and 32, as follows:

"Certainly, for jurisdictional purposes the 'residence' of the corporation, or its so-called 'citizenship', still continues to be the state of its incorporation, but 'residence' in terms of venue is definitely broadened. * * * there should be a nullification of the problem as to the residency or inhabitancy in the district in which the general or principal office is located[79] and the meaning of such terms as 'principal office' and 'principal place of business' and any distinctions between them."

13. There remains the question of whether the general venue statute, Section 1391(c) is to be read together with the patent venue statute, Section 1400(b). Section 1391(c) states that "a corporation may be sued in any judicial district in which it is incorporated . . . and such judicial district shall be regarded as the residence of such corporation for venue purposes" and Section 1400(b) provides that a patent infringement action "may be brought in the judicial district where the defendant resides".

14. There is a direct conflict of opinion on this question among the several Courts of Appeals. The leading

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[79] Under the former venue statute, the general rule was that a corporation was a resident or inhabitant of the particular district in which its general or principal office was located.

case holding that the two Sections are to be read together is *Dalton* v. *Shakespeare Co.,* 196 F. 2d 469 (C. A. 5, 1952). The leading case holding to the contrary is *C-O-Two Fire Equipment Co.* v. *Barnes,* 194 F. 2d 410 (C. A. 7, 1952), affirmed by an equally divided Supreme Court, 344 U. S. 861 (1952). The question has clearly not been finally resolved by the Supreme Court.

15. The question is very simply this: Where venue is based solely on residence, is a patent infringement action against a corporation to be limited to the specific District in which the corporation has its main office or is it permissible to bring such action in any District in the State of incorporation, irrespective of where the main office is located? It is Petitioner's contention that the liberal definition of corporate residence as set forth in Section 1391(c) should be carried over to define the word "resides" in Section 1400(b). It would be an unrealistic rule indeed, if corporate residence were to be defined one way for patent infringement actions and another way for other civil actions.

16. It would again appear appropriate to consider the views of the Revisers of the Judicial Code. Professor James William Moore in his *Commentary on the U. S. Judicial Code,* 1949, pages 178 and 179 states:

> "But, and this is very important, all special venue provisions, whether within Title 28 or some other title, must be read in connection with the following general provisions: * * *", quoting, among others, Section 1391(c).

On pages 193 and 194 of *Moore's Commentary* the following appears:

> "Prior to the Code a corporation was a resident of the state in which it was incorporated; and, more specifically, where the state of incorporation was di-

vided into two or more districts, then in the district where its official residence was designated by the charter or state law and, in the absence of such a designation, then in the district where the corporation maintained its home office. The Code has made no change in this rule relative to the residence of a corporate plaintiff. For venue purposes it has, however, radically altered the rule relative to a corporate defendant. * * * This [Section 1391(c)] is a provision of general applicability to a corporate defendant, whether the case be one governed by a general venue provision, or by a special venue provision within Title 28, such as Section 1400(b) governing a patent infringement action, or by a special venue provision contained in some other title of the United States Code." (Bracketed material supplied.)

17. In the present case, Respondent Eastman Machine Company is a New York corporation (R. 10) and consequently its residence must be in the State of New York. Although its home office is in the Western District of New York, its name appears on the window of a showroom in the Southern District of New York and the address and telephone number of said showroom are listed under Respondent's name in the Manhattan (Southern District) alphabetical telephone directory (R. 12). The same address and telephone number under Respondent's name are also advertised in one New Jersey and three New York classified telephone directories (R. 18-21). Respondent is also listed as having an office in the Southern District of New York in four trade directories (R. 22-25). Its letterhead also lists an office in the Southern District of New York (R. 26). For twenty years Respondent Eastman Machine Company has been selling in the Southern District of New York through an independent sales agent and representative and said Respondent has done all the billing and delivering directly from its home office (R. 8, 9).

18. These facts, which are either admitted or not denied, clearly indicate that Respondent Eastman Machine Company resides within the Southern District of New York for purposes of a patent infringement action brought against it. Judge Holtzoff exceeded his statutory power when he transferred the present action out of the Southern District Court and a Writ of Mandamus should have issued to review and vacate the order of transfer.

CONCLUSION

It is respectfully submitted that good and sufficient cause and reason have been shown for the granting of a Writ of Certiorari.

Respectfully submitted,

SAMUEL J. STOLL,
Attorney for Petitioner.

19

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
Response to Question 1	1
Response to Question 2	1
Response to Question 3	3
District Court's Decision	5
Conclusion	6

TABLE OF CASES

Bankers Life Casualty Co. v. Holland, 74 S. Ct. 145, decided November 30, 1953	2
C-O Two Fire Equipment Co. v. Barnes, 194 F. (2) 410, CCA 7, affirmed 344 U. S. 861	1, 2, 4, 5
Dalton v. Shakespeare, 196 F. (2) 1469, C. C. A. 5	5
Galveston etc. Railway v. Gonzales, 151 U. S. 496	5
Gulf Research & Development Co. v. Leahy, 193 F. (2) 302, CCA 3, affirmed 344 U. S. 861	1, 2, 3
Stonite Products Co. v. Melvin Lloyd Co., 315 U. S. 561	4
W. S. Tyler Co. v. Ludlow Saylor Wire Co., 236 U. S. 723	5

STATUTES

Title 28 U. S. C.:	
Section 1391(c)	3, 4, 6
Section 1400(b)	3, 4, 6
Section 1406(a)	2

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Response to Question 1

Question 1 propounded by petitioner does not arise in the case at bar. In the present case, the suit was filed in the district of improper venue and the District Court therefore has the right to transfer the action.

Response to Question 2

Petitioner points to *C-O Two Fire Equipment Co.* v. *Barnes,* 194 F. (2) 410, CCA 7, affirmed in 344 U. S. 861 and to *Gulf Research & Development Co.* v. *Leahy,* 193 F. (2) 302, CCA 3, affirmed in 344 U. S. 861, to show conflict in the law on the propriety of a writ of mandamus under the facts

of the instant case. Petitioner's brief, Point 6, would appear to indicate that the *C-O Two* case (supra) went up to the Supreme Court on the question of the propriety of the writ of mandamus. That is not the situation. In that case, no question was raised on that score and in the oral argument, both the power of the Court and the appropriateness of the remedy were conceded (page 412).

The *Gulf Research* case (supra) will be discussed hereinafter.

Question 2 has been answered by the Supreme Court in *Bankers Life Casualty Co.* v. *Holland*, 74 S. Ct. 145, decided November 30, 1953. In that case, the question was whether mandamus is an appropriate remedy to vacate a severance and transfer order entered for improper venue. The Court held that the extraordinary writ of mandamus is reserved for really extraordinary causes and cannot be used as a substitute for appeal, even though hardship may result from delay and perhaps unnecessary trial.

Question 2 was also definitely answered by *Gulf Research Development Co., et al.* v. *Leahy*, 193 Fed. (2) 302, CCA 3. That case involved a petition for a writ of mandamus in a patent suit. Upon motion, the action was transferred to another district, pursuant to Sec. 1406(a) of Title 28 U. S. C. The plaintiff moved to retransfer the case back to the district where the suit was started, on the ground that venue in this district was proper. The petition was directed to the respondents (J. Leahy) order denying this motion. The Court held that the fact that petitioners would be put to inconvenience and expense of what might prove to be a wholly abortive trial because venue was improperly laid is an argument which might be addressed to Congress in support of legislation authorizing interlocutory appeal but does not constitute ground for invoking mandamus power against the district judge. The Court further held that where appeal statutes establish conditions of appellate review, an appellate court cannot rightly exercise its discre-

tion to issue a writ whose only effect would be to avoid those conditions and thwart Congressional policy against piecemeal appeals.

The decision of *Gulf Research & Development Co.* v. *Leahy* (supra) was affirmed by an equally divided Court in 344 U. S. 861.

Therefore, it is submitted:

1. There is no conflict of law regarding the propriety of a writ of mandamus under the facts in the present case.

2. The refusal of the Circuit Court of Appeals to issue such a writ should not be overruled by the Supreme Court.

3. If the District Court erred in its transfer of venue, either because of its mistake of law or because of its unwarranted interpretation of the facts establishing lack of venue, the proper orderly procedure is by appeal from the final decree and not by the extraordinary action of a writ of mandamus.

Response to Question 3

In its argument in support of question 3, petitioner proposes to ignore entirely the venue statute Title 28 U. S. C. Sec. 1400(b) directed to patent infringement suits and to substitute statute Title 28 U. S. C. Sec. 1391(c), which on its face has no application to patent infringement suits. Under Title 28 U. S. C. Sec. 1400(b), patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business. If the suit is not brought in the district where the defendant resides, then two conditions must be present for proper venue, namely, (1) the defendant must commit the act of infringement in the district where the suit is brought, and (2) the defendant must have a regular and established place of business in the district.

Under Title 28 U. S. C. Sec. 1391(c), a corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business. The interpolation of this statute Sec. 1391(c) into the infringement venue statute Sec. 1400(b), as the petitioner contends, would have the effect of practically nullifying the whole infringement venue statute, since the mere doing of business in a district lays a party open to infringement suit in this district, even though not a resident of this district and even though it committed no acts of infringement therein. This was not the intent of Congress.

Question 3 was answered by the Supreme Court in *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561. In that case, the Court in holding that a general venue statute must give way to Sec. 48 (Title 28 Sec. 1400(b)) relating to venue in patent infringement suits, said:

> "We hold that Section 48 is the exclusive provision controlling venue in patent infringement proceedings."

Question 3 has also been definitely answered in *C-O Two Fire Equipment Co.* v. *Barnes*, 194 F. (2) 410, C. C. A. 7. The question in that case was exactly that propounded herein, namely, whether the definition of corporate "residence" for venue purposes contained in Title 28 U. S. C. Sec. 1391 (c) applies to Sec. 1400 (b) relating to venue in actions for patent infringement. That Court, following the *Stonite* case (supra), held that action against a corporation for patent infringement, cannot properly be brought in a district other than that of its incorporation, even though it has a regular and established place of business in such district, in the absence of allegation that it has committed acts of infringement therein. This *C-O Two* case was affirmed in 344 U. S. 861 by an equally divided court and rehearing was denied in 344 U. S. 900. The law, therefore, now stands as decided in *C-O Two Fire Equipment Co.* v. *Barnes*, 194 F (2) 410, C. C. A. 7.

The only decision noted by petitioner as supporting his position is that of *Dalton* v. *Shakespeare,* 196 F. (2) 1469, C. C. A. 5. This case was however decided in April of 1952, whereas the Supreme Court affirmed the decision in *C-O Two Fire Equipment Co.* case (supra) in the October term of 1952. Consequently, any question as to the law on this point has been set at rest by the affirmance of the Supreme Court in the *C-O Two* case (supra). If the Fifth Circuit still persists in deviating from the law established in the *C-O Two* case (supra), that is not justification for the present petition for certiorari, especially since the petitioner is no party to any such deviating decision but is party to a suit in which the law set forth in the *C-O Two* case and now established by affirmance of the Supreme Court has been properly applied.

District Court's Decision

The lower court, in accordance with the decision in *Galveston etc. Railway* v. *Gonzales,* 151 U. S. 496, held that the respondent corporation having its home offices and manufacturing facilities in the Western District of New York, was resident of that district and not of the Southern District. A mere sales agency in the Southern District, whose expense of doing business is not paid by the respondent corporation, is not a regular and established place of business of this corporation under the rule in *W. S. Tyler Co.* v. *Ludlow Saylor Wire Co.,* 236 U. S. 723. In the absence of a regular place of business in the Southern District and in the absence of any allegation of infringement in this district, the respondent corporation cannot be sued in this district.

CONCLUSION

1. No conflict of law exists in regard to the propriety of a writ of mandamus. Therefore, Supreme Court should not overrule the refusal of the Court of Appeals to issue such a writ. The petitioner must bide his time until final decree and bring up the issue of improper transfer of venue in a proper appeal procedure, as prescribed by the appeal statutes.

2. Title 28 U. S. C. Sec. 1400(b) is the exclusive provision venue in patent infringement proceedings and cannot be complemented by the provisions of Title 28 U. S. C. Sec. 1391(c).

3. District Court properly transferred the action to the Western District of New York.

Respectfully submitted,

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